SRI BINARAYA SDN BHD

v.

GOLDEN APPROACH SDN BHD

HIGH COURT MALAYA, SHAH ALAM
CHIN FOOK YEN J
[COMPANIES WINDING UP NO: MT4-28-1-1999]
12 JUNE 2000

COMPANY LAW: *Winding-up - Petition - Striking out - Whether s. 221(2)(f) Companies Act 1965 applicable - Whether said section only applies to directions as to proceedings and not relief - Whether O. 18 r. 19(1)(d) Rules of the High Court 1980 applicable instead - Whether petition struck out under inherent jurisdiction of court*

COMPANY LAW: *Winding-up - Petition - Disputed debt - Whether bona fide*

COMPANY LAW: *Winding-up - Petition - Petition based on company failing to make payment of sums certified in interim certificates - Whether petition dismissed*

CONTRACT: *Building contract - Interim certificate - Failure to pay certified sum - Whether builder can determine contract or suspend work - Right to payment - When accrued - Enforcement thereof - Whether as contracted between parties*

The petitioner, a contractor, carried out construction works for the respondent company ('the company'). The petitioner applied to wind up the company based on the company failing to make payment of sums certified in interim certificates issued to the company. The company applied by way of a motion to strike out the petition: (i) pursuant to s. 221(2) of the Companies Act 1965 ('the Act'); (ii) under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'); and/or (iii) under the inherent powers of the court on the ground of abuse of process. In this instance, both the petition and the motion were heard together.

Held:

[1] Section 221(2)(f) only gives "directions as to proceedings" and not of relief that the court may grant. As such, s. 221(2)(f) could not be relied upon to strike out a petition for winding-up.

[2] Order 18 r. 19(1)(d) RHC directly refers to striking out application for abuse of process and r. 19(3) refers to petition. As such, O. 18 r. 19(1)(d) can be relied upon in an application to strike out a petition

presented under s. 218 of the Act. However, the said application should be heard under the inherent jurisdiction of this court.

[2a] The circumstances in which the inherent jurisdiction of the court may be invoked is a jurisdiction to be exercised with great circumspection, and the test to be applied is whether it is impossible for the party concerned to succeed in his claim. Based on the issues raised herein, the company could not show whether it would be impossible for the petitioner to succeed in its claim. The grounds raised fell very short of the requirement of the law. As such, the application to strike out the petition should be dismissed with costs.

[3] A petition is not a suitable proceeding in which to decide a question as to the validity of a disputed debt. The question was whether the company in good faith and on substantial grounds disputed the liability of the sum claimed. Based on the contemporaneous documents herein, the disputes raised were not *bona fides* and not on substantial grounds.

[4] The seriousness of honouring an interim certificate was emphasised in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*. A builder is allowed to determine the contract or to suspend work if the employer did not pay the certified sum therein.

[4a] The right to payment of the sums certified in the interim certificates accrued immediately upon the issuance of the said certificates. However, payment could only be enforced until expiry of 30 days as stipulated in the contract between the parties concerned. In any event, the company failed to pay the sum claimed. Further, the company had no available liquid assets to satisfy the said sum.

[Application to strike out petition dismissed; petition allowed with order in terms of costs.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 ***(refd)***

Appeal Update [1997] 1 CLJ 359 ***(refd)***

Bryanston Finance Ltd v. De Vries (No 2) [1976] Ch 63 ***(refd)***

Charles Forte Investments Ltd v. Amanda [1963] 2 All ER 944 ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Hee Enterprise Sdn Bhd [1988] 2 MLJ 447 ***(refd)***

Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151 ***(refd)***

Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290 ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(refd)***

Re A Company [1894] 2 Ch 349 ***(refd)***

Re Martin Coulter Enterprises Ltd [1988] BCLC 19 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637 ***(refd)***
Stonegate Securities Ltd v. Gregory [1980] 1 All ER 241 ***(refd)***
The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 ***(not foll)***
YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 3 CLJ 51 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218(2)(a), 221(2)(f)
Rules of the High Court 1980, O. 18 r. 19(1)(d), (3)

For the petitioner - YP Chan; YP Chan & Assocs
For the respondent - ET Low; M/s Cheong Wai Meng & Van Buerle

Reported by Usha Thiagarajah

JUDGMENT

Chin Fook Yen J:

This petition was presented on 4 January 1999 to wind-up the respondent company (company) under s. 218 of the Companies Act 1965 (the Act) on the ground that it was just and equitable to do so, as it was unable to pay its debts. There was no judgment debt and it was presented upon the inability of the company to pay the sum claimed for a period of 21 days after the service of a statutory notice of demand under s. 218(2)(a) of the Act.

By a motion filed on 20 May 1999 the company moved the court to strike out the petition;

(i) pursuant to s. 221(2) of the Act;

(ii) under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) and/or

(iii) under the inherent powers of the court on the ground of abuse of process.

I directed that both, the petition and the motion be heard together, one after the other. This was to save time, because both applications would necessarily refer to the same set of facts, likely with one more extensive than the other. In the event, I heard the motion first:

(i) Counsel for the company relied on s. 221(2)(f) of the Act in his striking out application. He did so because of the decision in *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1997] 4 MLJ 198 where RK Nathan JC (as he then was) held:

> ... I am of the view that s. 221(2)(f) of the Act clearly gives me the right to invoke an inherent jurisdiction to strike out a s. 218 petition. For clarity I reproduce herewith the said section:

221. Powers of Court on hearing petition ...

(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company or any person who has given notice that he intends to appear on the hearing of the petition –

(a) direct that any notices be given or any steps taken before or after the hearing of the petition;

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;

(c) direct that oral evidence be taken on the petition or any matter relating thereto;

(d) direct a speedy hearing or trial of the petition or any issue or matter;

(e) allow the petition to be amended or withdrawn; and

(f) give such directions as to the proceedings as the Court thinks fit.

If this Court finds sufficient grounds which warrant the striking out of a s. 218 petition I am of the view that pursuant to s. 221(2)(f) I can give directions to a respondent to apply to strike out the said petition and that if there is already such an application before me, that I do hear it.

The same counsel was of the view that the above provisions gave the court the power confined only to "give such directions as to the proceedings", but the discretion to strike out would still lie with the inherent jurisdiction of the court. At the time of his submission, the counsel had no knowledge that the *Lyn Country* case went on appeal and the Court of Appeal had, eventually, unanimously dismissed the appeal with costs and affirmed the above judgment. The Court of Appeal, however, did not give any written judgment (see *Appeal Update* [1997] 1 CLJ 359) and, as such, without knowing what issues were argued before the Court of Appeal and upheld by it, the conflicting judicial views will remain unresolved. Without a clear guidance, I will share the expressed view of the counsel, hopefully without showing any disrespect to the Court of Appeal, because, vague as it is, in my view, the section talks of only giving "directions as to proceedings" and not of relief that the court might grant. I hold that s. 221(2)(f) of the Act can not be relied upon to strike out a petition for winding up.

(ii) As for O. 18 r. 19 RHC counsel for the company further submitted that there were conflicting judicial views as to its application to a s. 218 petition. He also referred to the recent case of *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 1 MLJ 573. In that case, counsel for the petitioner submitted that the respondent company could not resort to O. 18 r. 19 RHC to strike out a petition presented under s. 218 of the Act, relying on *Lyn Country*'s case *(supra)*. After tracing some

of the previous judicial pronouncements on the point, C Skinner JC (as he then was) too felt bound by the Supreme Court decision in *Lai Kim Loi v. Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 where the then Supreme Court held at p. 295 I:

> In such a case the Rules of the High Court 1980 do not apply. The Companies (Winding-up) Rules 1972 apply ... .

In *Lai Kim Loi*'s case, besides a civil suit pending hearing, the petition had been presented under s. 181 or s. 218 of the Act (see p. 291 D). At the first instance, the learned judge considered that "a petition under s. 218 of the Companies Act could not be rolled up with a petition under s. 181 of the Companies Act". The Supreme Court accepted the view of the trial judge and expressed that the petition appeared to be a hybrid petition. As such there was an attempt by counsel for the petitioner to amend the pleadings in the petition. The Supreme Court held that:

> After consideration of the relevant provisions of our law, it could not be said this was a case of mere non-compliance with the rules of the court which requires only amendment of the pleadings. In this case the petition presented was not in accordance with the provisions of the Companies Act 1965 itself, resulting in a petition which was, we would agree with counsel for the respondents, imprecise and which appears to us to be a hybrid petition purporting to have been presented under two different sections of the Companies Act 1965.

In coming to that conclusion the Supreme Court explained:

> As for the procedure, it is provided in O. 88 r. 5 of our Rules of the High Court 1980 that certain applications under the Companies Act 1965, including an application under s. 181 of the said Act for relief in cases of oppression, must be by petition. After presentation of the petition, the petitioner must take out a summons for directions under r. 7 of O. 88. On the hearing of the summons the court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including, in particular, directions for the publication of notices. In other words, a petition under s. 181 of the said Act cannot be published without the prior order of the court, as was done in this case.
>
> On the other hand, an order for a company to be wound up on a petition under s. 218 of the Companies Act 1965 may only be made by a court if one of the circumstances specified in the following s. 218(1) of the Companies Act has been proved:

A list of the circumstances, from (a) to (k) then followed. Thereafter, the Supreme Court continued to say that:

> In such a case the Rules of the High Court 1980 do not apply. The Companies (Winding Up) Rules apply and ... (hereinafter referred to as the said Words).

The *ratio decidendi* there was that no "roll up" petition could be allowed. The opening paragraph began with the phrase – "On the other hand" – This clearly indicates an opposite view from what was said, on the one hand, in the preceding paragraph. In that paragraph the learned judge held that in a s. 181 petition, there were provisions in the RHC for taking out summons for directions and so on. Obviously, on the other hand, in a s. 218 petition or "in such a case," such provisions of the RHC do not apply, because "The Companies (Winding Up) Rules apply." On the basis, no roll-up petition is allowed. Therefore, in the context, the said words cannot be taken to mean, with respect, what the JC meant in *Lyn Country* case *(supra)*. The said words must have been taken out of context. Nowhere throughout the case of *Lai Kim Loi* was O. 18 r. 19 RHC ever mentioned or referred to as being inapplicable to an application to strike out a s. 218 petition. In fact, O. 18 r. 19(1)(d) directly refers to striking out application for abuse of process and r. 19(3) refers to petition. I rule O. 18 r. 19 (1)(d) RHC can be relied upon in an application to strike out a petition presented under s. 218 of the Act.

(iii) The inherent jurisdiction of the court has been in existence as a common law right from a long way and will certainly apply to strike out petition for abuse of the process of the court. In *Chong Chee Yan*'s case *(supra)* the JC (as he then was) in sharing the view of the other judges identified that power as the "residuary or reserve powers of the court" and "powers enjoyed by a court in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process" (at p. 582H). With respect, I too agree with the state of the law as expressed.

As such, I heard the application made under the inherent powers of the court. From the wordings of the statutory notice of demand, the petitioner herein claimed as a creditor whose debt was presently due as opposed to a contingent or prospective creditor. In response, the company, through its solicitors' letter, replied that "in the light of the reasons stated above (the company) genuinely dispute (the petitioner's) claim as appeared in the statutory notice". In order to understand how the dispute arose, it is necessary to give a brief account of the background. In his affidavit (encl. 14), the deponent for the petitioner, one Mr. Thye Fook Keong (Mr. Thye), informed the court that the company was involved in the development of a project known as Diamond Creek Country Retreat (the said project) at Ulu Behrang, the State of Perak and the petitioner was its main contractor only in respect of two items of the said project, namely:

(a) the main access road works (main access road works) and

(b) the stage 1 civil infra-structural works (stage 1 works).

At all material times, the petitioner dealt with the company's own representative and consulting engineers, namely, M/s Weathered & Howe (M) Sdn Bhd (the engineers) throughout the course of construction of the two items of the project concerned. The petitioner maintained that it had carried out the construction work for the benefit of the company for which the company was indebted to the sum of RM2,108,820.22 making up as below:

(a) for the main access road works = RM62,990.00

(b) for stage 1 works = RM2,045,830.22

Total = RM2,108,820.22 (the sum claimed).

It is to be noted that out of the sum for stage one works claimed, a sum of RM359,945.94 was due and owing to one other company, a nominated sub-contractor, namely, PJ Indah – Adco Sdn Bhd (Adco). The petitioner averred that the sum claimed had been duly approved by the engineers. Mr. Thye stated further that before the service of the statutory notice of demand there was a meeting held on 21 August 1998 in the company's office between representatives of both the company and Adco, but in the absence of the petitioner. After the meeting Adco wrote two letters to the company confirming the meeting held and also stating that the company, having admitted no money to settle its debts, agreed to contra by its property at value of RM10.80 per sq. ft. (see exh "TFK-6"). The letters stated that Adco could not accept the proposal, because Adco needed cash to pay and settle with their own suppliers who were threatening with legal action. The last of the two letters also indicated that the company had refused to allow the petitioner to assign the portion of debts due to Adco in order to enable Adco to claim directly from the company. On 8 December 1998. the statutory notice of demand was served on the company. Subsequent thereto, two more meetings were held, only this time no offers were made and for the first time the company raised the issue of dispute to the demand of the petitioner. This took place at the last of the two meetings held. The petition, filed on 4 January 1999, was supported by:

(i) Adco, as supporting creditor for the sum of RM1,134,215.64,

(ii) The engineers, as supporting creditor for the sum of RM239,864.76,

(iii) Ulu Behrang Estate Sdn Bhd, as supporting creditor for the sum of RM13,135,657.13, but was opposed by

(iv) Poly Glass Fibre (M) Sdn Bhd. a contributory of the company.

Against this backdrop, the company applied to strike out the petition. As ruled earlier, the company could apply to strike out the petition under the inherent jurisdiction of the court on the ground of abuse of process. If a court considers that a winding up petition is an abuse of process, it will restrain the presentation

of the petition, if it has not already been presented, by the usual order of injunction. If it has already been presented, the court can stay further proceedings or strike out the petition or dismiss it without hearing it. These days such applications may be made by motion in those proceedings. Such powers existed way back in the early days. In *Re A Company* [1894] 2 Ch 349 the head-note reads:

> Where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it.

In *Re Martin Coulter Enterprises Ltd* [1988] BCLC, on the power to strike out, Vinelott J said, at p. 19:

> The power to strike out a proceeding on the ground that it is an abuse of the process of the court is founded on the principle that parties are not to be harassed by frivolous, vexatious or hopeless litigation.

But, whether a company should be wound up or whether the petition to wind up should be prevented are two separate questions, subject to different considerations. I refer to cases beyond our shores, because I can find none at home directly on the point, beginning with *Charles Forte Investments Ltd v. Amanda* [1963] 2 All ER at p. 944. In that case, the defendant, having failed to have the transfer of his shares registered, petitioned to wind up the plaintiff company. The plaintiff company then invoked solely the inherent jurisdiction of the court applying for a stay of the proceedings on the ground of abuse of process. At the Court of Appeal, Willmer LJ said that as to the circumstances in which the inherent jurisdiction of the court might be invoked, he entirely accepted the learned trial judge's caution that:

(i) That was a jurisdiction to be exercised with great circumspection; and

(ii) the test to be applied as being whether it was **impossible for the party concerned to succeed in his claim** (emphasis added).

The next case I refer to is *Bryanston Finance Ltd v. De Vries (No. 2)* [1976] Ch 63, where minority shareholder threatened to present petition to wind up the company. Immediately, the company moved the court for an injunction to restrain the defendant from petitioning to wind it up, *inter alia*, for abuse of the process of the court. Indeed the defendant was a small shareholder holding 62 shares only in a total issued capital of the plaintiff company amounting to 7,414,938 shares. At the first instance, the learned trial judge applied the test of the balance of convenience as laid down in the *locus classicus* case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, and granted the injunction. In the Court of Appeal, Stephenson LJ, in agreement

with Willmer LJ, explained as follows:

> It is the practice for a company which objects to a shareholder's improperly presenting a petition to wind it up to move for an injunction to restrain him: the court's jurisdiction to do so is a facet of its inherent jurisdiction to prevent an abuse of its process: ... If he applied to strike out the petition under the inherent jurisdiction or under RSC, Ord. 18, r. 9 *[sic]* (1)(d) and (3), he would not be able to rely on anything said by the House of Lords in the *American Cyanamid* case [1975] A.C. 396 or on the balance of convenience.

He continued to say that Lord Diplock's words in the *American Cyanamid* case – "an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiffs legal right," – do not apply to such an application as in his case. He held that "unless the plaintiff company can prove that **a petition is bound to fail** .. the defendant cannot be restrained, even temporarily, from presenting it" (emphasis added). It is pertinent to note that on 16 October 1975 the Appeal Committee of the House of Lords dismissed a petition by the plaintiff for leave to appeal to the House of Lords.

I now move to the Court of Appeal in New Zealand. In *Anglian Sales Ltd v. South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249, the respondent (South Pacific) petitioned to wind up the appellant (Anglian). Anglian sought a stay of further proceedings on the petition on the ground of abuse of process. At the Court of Appeal, on the point of putting a halt to the petition, McMulin J, came up with these strong words:

> But the right to have a winding-up petition determined, being a right conferred by statute, ought not be taken away except where the existence of that very statutory right itself is seriously challenged: . ... In our opinion a creditor's right in this respect ought not to rest simply on the balance of convenience considerations which may be relevant to an application for an interim injunction. Something more than that is required.

In the same appeal, Greig J explained, at p. 254:

> There is a clear distinction between the exercise of the discretion on hearing the petition and the exercise of the inherent discretion to restrain or stay the presentation of or further proceedings on a petition. What the appellant invokes in this case is the latter; to stay proceedings as vexatious or an abuse of the Court's process. That is a general inherent jurisdiction which is exercisable in appropriate cases in any proceedings, including a petition for winding up brought under the Companies Act. It is a jurisdiction which is to be exercised with great circumspection. The test is whether it is **impossible** for the party concerned, in this case the petitioner, **to succeed in its claim**. That, in my view, is the basis for the decision in *Charles Forte Investments Ltd v. Amanda* [1963] 2 All ER 940 – see especially the judgment of Willmer LJ at p 944G, and *Bryanston Finance Ltd v. de Vries* (No 2) [1976] Ch 63 – see especially the judgment of Buckley LJ at p 76F (emphasis added).

These are strong persuasive authorities from the commonwealth countries. With the greatest respect, I agree and accept them to apply in the instant case. Whether it is an application to prevent the presentation of a petition or to strike out a petition the basis is the same *ie*, on abuse of process. It will not alter the nature of the proceedings. The order at the end of the day, if allowed, is one of dismissal without hearing. In recent trend, invariably when a petition is served there will be an application by the company to strike out the same and in some instances, if not already presented, application to restrain the petitioning. My view, therefore, is that the right to present petition to wind up a company is a statutory right and can not be taken away simply, unless the company can seriously challenge that the petition is bound to fail in its claim. A challenger may well be reminded that the task will be heavy, because "if a challenge were allowed in circumstances short of this, the court would in effect be refusing to give effect to the very right which the statute has conferred upon a creditor to have the petition itself considered." (see p. 252 *Anglian* case)

With those principles in mind, I now turn to consider the application herein to strike out.

(a) Main Access Road Works

First, I will deal with the main access road works, where the petitioner claimed RM62,990 being due and owing for final payment. Counsel for the respondent company in his written submission pointed out that the claim of RM62,990 was based on exh "TFK-1" where the total work done was RM2,816,801.82 whilst from exh "TFK-2" the petitioner had acknowledged receipt of RM3,172,311.82. This would mean the petitioner had been overpaid to the sum of RM355,510. Therefore, the claim for RM62,990 could not be correct. Again, one Mr. Hoon Yong Yong (Mr. Hoon), a deponent for the company, challenged the figure of RM62,990 being correct. He further stated in para. 4c of his affidavit (encl. 3) that in respect of the main access road works, the award sum was RM2,998,398 with payment to date of RM3,172,311.82. He then referred to exh "E", the engineers' final payment certificate (revised). It was stated in exh "E" that the amount certified for payment was RM54,400 as compared to RM62,990 (see exh "TFK-1") claimed in the petition and both dated the same day *ie*, 21 January 1998. Therefore, it was claimed that the statutory demand in s. 218 notice for RM62,990 was bad in law. The petition based on an invalid notice, therefore, must be struck out. According to counsel of the petitioner, there were variation orders (1 to 19) and the correct comparison under final certificate (exh "TFK-1" dated 21 January 1998) was, first of all the contract sum as below;

a (i) Award sum (Initial) - RM 2,998,398

(ii) Variation orders (1 to 19) RM 283,407.58

Total RM3,281,805.58 (contract sum)

b Then, the total work done to date was RM3,247,295.49 (see exh "TFK-l" p. 3).

Less: Previous Valuation certified	RM3,172,311.82
Retention sum	RM 11,993.60
	RM3,184,305.42

c So, the amount for work done is less than the total contract sum. Again, the balance payment certified due was (3,247,295.49 – 3,184,305.42) RM62,990.07. I also notice that in exh "TFK-1" (3 pages), it was shown the certificate from the engineers for final payment of RM62,990 for the main access road works and it was the final certificate (meaning Certificate No. 9). Exh "TFK-2" was d the statements of indebtedness also for the main access road works. It can be seen that all the other eight (8) earlier certificates, with the amounts mentioned therein had been paid accordingly without any dispute. The only dispute alleged here concerned the sum of RM62,990. I think it is appropriate at this stage to refer to the affidavit in reply (encl. 14) of the petitioner on e the point, before it goes haywire. I have occasion to look at p. 3 of exh "TFK-1". The difference of RM8,589.43 between the two figures (RM62,990.07-RM54,400.64) was actually the 5% retention sum. This was clearly mentioned at p. 2 of exh "E". Mr. Thye explained that subsequently the entire 5% was released, subject to a retention sum of RM7,500, as advised by the engineers f as can be seen in the handwritten note in exh "TFK-10". However, the company chose, on its own, to withhold a sum of RM11,993.60 instead. In view of the above, I can not possibly conceive that the petition is bound to fail, so far as this part of the claim is concerned.

g (b) Stage 1 Works

Exh "TFK-3" was the statement of indebtedness in respect of the stage 1 works. There were so far 23 approved progress payment (interim) certificates (interim cert) issued. The same exhibit showed that the company had paid in full for all the interim certs from Nos. 1 to 18 and, h in part for interim cert No. 19. From interim certs Nos. 19 (partly paid) to 23 (5 interim cert), the total balance sum unpaid was RM2,045,830.22 for stage 1 works, inclusive of sum due to Adco, as mentioned earlier.

(i) It is common ground that stage 1 works was scheduled for completion i on 2 May 1996, but was not completed until 15 August 1997. Mr. Hoon averred in his affidavit (encl. 3 pa. 4e) that there was delay for 358 days for which the petitioner had to pay the company

RM1,000 per day, as compensation. Accordingly, to him the compensation in this connection was not accounted for in the engineers' certificates. So far there was no dispute. Mr. Thye, however, denied being liable thereto. He informed the court that the deadline for completion was further extended by the engineers to 15 August 1997. He exhibited "TFK-12" where the engineers approved "The extension of time is from 3 May 1996 to 15 August 1997". In response, counsel for the company, on his own volition, submitted that the presence of exh "TFK-12" would create "a triable issue", because in another subsequent letter of the engineers dated 16 October 1997, exh "RR-5". The engineers themselves indicated then that "they are still going through all reasons submitted". If, as submitted by counsel of the company, there was triable issue raised in the petition, this application to strike out must be dismissed without further consideration, because the state of the law is that the petition is bound to fail in its claim.

(ii) Secondly, Mr. Hoon complained of the defective and faulty works not being rectified. So far as the defects were concerned, the engineers had spelt them out in their letter (exh "G") dated 22 August 1998. Complaints subsequent thereto came but from the company itself, as shown in exhibits from "H-3" to "H-5", dating from 19 August 1998 to 25 November 1998. Mr. Hoon also mentioned of the delay on the part of the petitioner in not supplying full and detailed documents for re-measurements in order to process for the final accounts. These particulars were required for computation of works for payments to be made and, I think, no one can be more anxious than the petitioner themselves to have the accounts finalised. Any delay will necessarily be disadvantageous to the petitioner, because delay means no payment. In response, Mr. Thye said that the issues of defect and final account were not relevant to the issue of payment under interim certs. In the first place, he explained that there was a retention sum of 5% amounting to RM620,659.74 still in the possession of the company. The amount would be enough to remedy the defects, if any. There was no justifiable reason to withhold the payment of the sum over due for 16-24 months. Furthermore, in response to exh "G", – the complaints from the engineers – subsequently there was an offer for joint inspection into the complaints of defect, but the company failed to respond. The defects would appear to have been remedied. It must be noted that the professional engineer, one Mr. Ng Foo Chow, of the engineers retained for the project, made a statutory declaration on 8 March 1999 (exh. "TFK-4"). He referred therein to the relevant interim certificates and declared that all those certificates certified and issued by him to the petitioner were good for payments on due dates as all pre-conditions had been fulfilled by the petitioner. That will mean

all the previous complaints of defect had been taken into consideration before making the statutory declaration. He further clarified that the certificates concerned were issued subsequent to joint inspections of the works involved carried out by all the three parties concerned, namely, the petitioner (including Adco) the company and he himself. More importantly, he declared that as far as the engineers were aware there were no disputes nor defects being raised by the company at the material times. I notice that the contents of exh "TFK-4" had not been disputed seriously with any particulars.

(iii) Lastly, Mr. Hoon indicated to the court that the said amount of RM2,108,820.22 claimed in the statutory notice included a sum of RM359,945,94 for works done by Adco, the nominated sub-con. He contended that the petitioner should have but not paid Adco the money and, as such, the petitioner had no *locus standi* to make the claim. As observed earlier, Adco wrote to the company two letters regarding the meetings between them held on 21 August 1998. In the second letter dated 9 November 1998 Adco mentioned the company's refusal to allow the assignment of the sum of RM359,945,94 by the petitioner to Adco. As such the said sum would have to be included in the petitioner's claim under stage 1 works.

In addition to the above-mentioned, I also notice that there were a number of stale complaints and non-issues raised by the company. Suffice to mention just one. Mr. Hoon for the company exhibited "G-1", a complaint dated 13 November 1997 raised by the engineers themselves. In reply thereto, Mr. Thye by exh "TFK-13A" explained to the engineers the reasons for the unfortunate situations brought about as complained in exh "G-1" and, from the subsequent events of further payments, as advised by the engineers, it would appear that the matters complained of had been resolved. On the issue of locus, I think it is unfair to allow the company to blow hot and cold. Since it could not agree to let Adco to claim on its own for the works done as the nominated sub-con, how could it be wrong for the petitioner to have included it in its claim. In view of the issues raised by the company, I wonder if counsel for the company can seriously contend that the petition will be impossible to succeed in its claim. I find the grounds raised by the company fell very short of the requirement of the law. Relevant to this case is that part of the judgment in *Chip Yew Brick Works Sdn Bhd v. Chang Hee Enterprise Sdn Bhd* [1988] 2 MLJ 447 at pp. 448 and 449:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1949] 2 All ER 197.

For reasons aforesaid, the application to strike out the petition is dismissed with costs.

I now deliver my decision on the petition. It is well settled that a petition is not a suitable proceeding in which to decide a question as to the validity of a disputed debt. In *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241 at 243, Buckley LJ said:

> If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed.

So, the question here is whether the company in good faith and on substantial grounds disputes liability of the sum claimed. I will now consider in greater detail of the material and relevant facts disclosed by the affidavit evidence from both sides, in addition to what has been set out earlier. By so doing, I may have to repeat occasionally some of them. First, the claim of RM62,990 for the main access road works. The company's strongest point to show that the figure of RM62,990 was in error was its exh "E". The amount shown in exh "E" was only RM54,400 being payable. I have explained earlier in my judgment the reason for the difference between the two figures, being the 5% retention sum. So, even if the contention of the company that the amount of RM54,400 was correct, it was due and unpaid and, the company was indebted. Nevertheless, this sum is also disputed now, but no particulars anywhere have been condescended upon for the dispute. It remains a mere denial. It was also submitted that the retention sum of RM11,993.60 was insufficient to cover the cost of repairs of the defects. Again there was no amount mentioned, being sufficient. The dispute is untenable in view of what their own engineers have said in their handwritten note in exh "TFK10" dated 23 December 1997. The engineers advised the respondent company to retain only RM7,500 being "needs for repair of road sides and road surface". The company, however, on its own retained RM11,993 instead. Even on its own, the company thought RM11,993 would be enough for the purpose, without disputing the amount RM54,400 due and payable then. I do not think the company's dispute herein is *bona fides* and on substantial grounds. In the Court of Appeal case of *YPJE Consultancy Services Sdn Bhd v. Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 3 CLJ 51, the question that arose for consideration was whether the court should dismiss the application for winding up because the amount which was demanded in the statutory notice was "incorrect or unclear". His Lordship Ahmad Fairuz JCA, after reviewing cases

from overseas, held that so long as the amount exceeded the quantum of RM500 it was legitimate to look at the circumstances in order to determine whether the company was unable to pay its debt. So, the amount of RM54,400 here, being indisputable, is far in excess of the quantum of RM500 to found the winding up order, assuming RM62,990 was incorrect which is contrary to my view.

Now, I move on to consider the claim under stage 1 works:

(1) Original contract sum	-	RM 21,300,000
(2) Variations: Vol-29	-	RM3,883.178.49
(3) Current contract sum	-	RM25,183,178.49

In his submission for the company, counsel mentioned that the award sum was RM21,300,000 and to-date the sum of RM20,101,000 has been paid. That means the balance sum is RM1,199,000 (21,300,000 – 20,101,000). Here, again I notice that the sum for variation orders was left out in his submission, giving the impression that the claim of RM2,045,930.22 for stage 1 works was manifestly wrong. Be that as it may, the issues taken up by the company were, mainly, (a) over-certifications, (b) defects in the works and (c) liquidated damages. On the over-valuation, counsel of the company pointed to exh "TFK-14B" and exh "TFK-14C", where in the former the amount certified payable was RM289,250 whilst in the latter the amount was stated at RM445,000, suggesting that the latter was over-valued. As for the two exhibits mentioned, the two figures could not be over-valuation, because exh "TFK-14B" was only an interim valuation (RM289,250) for progress payment certificate No. 8, whilst exh "TFK-14C" was a final valuation (RM445,000) for a different progress payment certificate, namely, No. 14. That apart, they are non-issues, because they have been paid and, the claims now are for interim certificates No. 19 onwards. On the point of defects the company exhibited "G-l", a letter dated as early as 13 November 1997 forwarded by the engineers regarding complaints by the company of uncompleted defect works. To disclose exh "G-l" dated 13 November 1997 is to raise stale complaints. In the instant case, the sum claimed is based on (I) the approved final certificate issued on 21 January 1998 for the main access road works and (2) approved interim certificates Nos. 19 (partly) to 23 issued since 27 April 1997 for stage 1 works. For item (1), certificate of practical completion was issued on 27 July 1995 and for item (2) issued on 15 August 1997 and now to raise matters as early as 1996 is untenable. As for the 'schedule of defects" attached to a letter, exh "G" dated 22 August 1998 and "G-1" by the engineers, the answer can be found in the statutory declaration, exh "TFK-4" dated 8 March 1999. Mr Ng declared therein that the conditions attached to the certificate of practical completion were fulfilled by the petitioner within the stipulated period. It must be borne in mind, that each time before such a certificate was to issue, there had been

joint actions by all concerned to inspect the works involved. To raise issues on defects long after the expiry of the period for doing so and without even suggesting any figures is not *bona fides* and there is no substance. As for the defective works and liquidated damages, I do not think, in the field of construction works, as here, there would not be any legitimate claim and deductions allowed. In any event, to me, this is what the retention sum is meant for. Until the final accounts are taken, the exact amount due to the parties will remain inexact to an extent, but not totally uncertain and, the retention sum will be kept with the company for the purpose. Looking at the contemporaneous documents I am of the view that the disputes raised here are not *bona fides* and not on substantial grounds.

The next question before the court is when the sums so certified by the engineers in the approved final payment certificate (main access road works) and the interim progress certificates (stage 1 works) become due and payable. In this connection, cl. 47 of the contract provides for, *inter alia*, the "valuation of work done", "the issuance of interim certificates", "sums to be certified in the interim certificate" and "payment of interim certificate". Clause 47(d) states:

> Within a number of days as stated in the Appendix to these Conditions or if none so stated then within thirty (30) days of the issue of any such Interim Certificate aforesaid the Employer will make a payment to the Contractor of the amount certified as due to the Contractor in the said Certificate.

In my view the time for honouring the interim certificates issued under cl. 47(d) is 30 days from date of issuance thereof and, the seriousness of non-payment is spelt out in cl. 52 of the contract as follows:

> 52. Default of Employer.
>
> (a) In the event of the Employer:
>
> (i) Failing to pay to the Contract the amount due under any certificate of the Engineer within a further thirty (30) days after the same shall have become due under the terms of the Contract, subject to any deduction that the Employer is entitled to make under the Contract; or ...
>
> The Contractor shall be entitled without prejudice to any other right or remedy to terminate the Contract by giving notice in writing by registered post to the Employer.

In the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 the Supreme Court there was called upon to determine the question under cl. 30(1) as to when the amount certified in an interim certificate became due and payable. In the case, the period for the honouring of interim certificates issued under cl. 30(1) was 21 days from date of presentation thereof to the employer. "In other words, although **the right** to payment of the sum so certified will have accrued upon

presentation of an interim certificate to the employer, payment thereof may not be **enforced** until expiry of the period of 21 days" (see p. 64H). His Lordship emphasised the seriousness for the honouring of the interim certificate under cl. 26(1)(a) which allowed the builder to determine the contract or to suspend works if the employer did not pay the certified sum. Similarly, in our case, the right will have accrued immediately upon issuance of the certificates concerned, however, payment thereof may only be enforced until expiry of the period of 30 days. The question called for determination in Dr. Leela's case was, similar to our case, the construction to be given to an interim certificate issued in connection with the construction industry as to when the amount certified therein became due and payable. Although *Dr. Leela*'s case *(supra)* was an O. 14 application, I will adopt the *ratio decidendi* there to our case here, as the issue involved is the construction of similar words used in the same construction industry.

In any event the company failed to pay the sum claimed. Evidence was also adduced to show that the company has no available liquid assets to satisfy the sum claimed (see exh. "TFK-6"). It is also note worthy that the debts total of the supporting creditors amounted to RM14,375,337.53, without taking into account the debt due to the petitioner of RM2,108,820.22. In *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1992] 1 MLJ 313, the Supreme Court held that:

> In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from Buckley on the Companies Act (13th ed) at p 460:
>
> > In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Applying the principles above-stated, even though the company may have real properties, but without available assets to meet its current liabilities. I have to exercise my discretion in allowing the petition to wind up the company. Order in terms with costs.